United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-7507

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

DOCKET NUMBER 76 7507

115

BISOANATH HALDER

v

AVIS RENT-A-CAR SYSTEM, INC.

BRIEF FOR PLAINTIFF-APPELLANT

+

APPENDIX

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NUMBER 76-7507

BISWANATH HALDER,

PLAINTIFF-APPELLANT,

V

AVIS RENT-A-CAR SYSTEM, INC.,

DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

BISWANATH HALDER

APPELLANT PRO SE

173-17 65 AVENUE

FLUSHING, N.Y. 11365

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2. WHETHER OPEN DISCLOSURE OF ALL POTENTIALLY RELEVANT INFORMATION IS FUNDAMENTAL IN THE ADVERSARY SYSTEM OF JUSTICE.

3. WHETHER ATTORNEYS' FEES CAN BE AWARDED TO A CORPORATE DEFENDANT WHO IS VIOLATING THE LAW OF THE LAND.

4. WHETHER THE COMPLAINT CAN BE DISMISSED FOR LACK OF PROSECUTION WHILE THE PLAINTIFF HAS BEEN PROSECUTING IT VIGOROUSLY AND DILIGENTLY.

FACTS

THE PLAINTIFF-APPELLANT WAS BORN IN INDIA, OF INDIAN PARENTAGE. HE HOLDS A BACHELOR'S DEGREE IN ELECTRICAL ENGINEERING FROM THE UNIVERSITY OF CALCUTTA. HE IMMIGRATED TO THIS GREAT COUNTRY IN MAY 1969.

PRIOR TO COMING TO THE UNITED STATES, THE PLAINTIFF HAD GAINED TWO YEARS OF EXPERIENCE IN COMPUTER SOFTWARE WITH TWO REPUTABLE COMPUTER MANUFACTURERS IN ENGLAND. HE WAS ADMITTED TO THIS COUNTRY AS AN ALIEN WHO IS A MEMBER OF A PROFESSION FOR WHICH THERE IS AN AVAILABLE MARKET FOR HIS PROFESSIONAL SERVICES. 8 USCA 1153 (a)(3).

EVER SINCE THE PLAINTIFF ARRIVED IN THE LAND OF OPPORTUNITY, HE HAS BEEN LOOKING FOR A JOB.

THE PLAINTIFF, IN OCTOBER 1976, COMMENCED

THE INSTANT ACTION AGAINST THE DEFENDANT, AVIS RENT-A-CAR SYSTEM, INC., BY FILING A COMPLAINT AT THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. IN THE COMPLAINT THE PLAINTIFF CHARGED THAT THE DEFENDANT DENIED HIM EQUAL EMPLOYMENT OPPORTUNITIES AS PROVIDED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 42 USCA 2000e et seq., BASED ON ITS FAILURE OR REFUSAL TO EMPLOY HIM AS A PROGRAMMER-ANALYST BECAUSE OF HIS NATIONAL ORIGIN.

AROUND THE SAME TIME THE PLAINTIFF COMMENCED SIX OTHER ACTIONS AGAINST COMPANIES MAKING SUBSTANTIALLY THE SAME ALLEGATIONS ASSERTED AGAINST THE DEFENDANT.

SINCE APRIL 1975 THE DISTRICT COURT, IN ACTIVE CONCERT AND CO-OPERATION WITH THE MULTI-NATIONAL CORPORATE DEFENDANTS, HAS BEEN, IN EVERY POSSIBLE AND EVEN IN SOME

IMPOSSIBLE WAYS, TRYING TO ANNIHILATE* THE POOR AND HELPLESS PLAINTIFF.

* "FEDERAL COURTS HAVE BEEN ASSIGNED PLENARY POWERS [TO ANNIHILATE THOSE WHO TRY] TO SECURE COMPLIANCE WITH TITLE VII." ALEXANDER V GARDNER-DENVER COMPANY, 1974, 415 U.S. 36, 45, 94 S.Ct. 1011, 1018.

ARGUMENT

THE PRIMARY OBJECTIVE OF CONGRESS IN ENACTING TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 WAS A PROPHYLACTIC ONE :

"IT WAS TO ACHIEVE EQUALITY OF EMPLOYMENT OPPORTUNITIES AND REMOVE BARRIERS THAT HAVE OPERATED IN THE PAST TO FAVOR AN IDENTIFIABLE GROUP OF WHITE [APPLICANTS] OVER OTHER [APPLICANTS FOR EMPLOYMENT]." GRIGGS V DUKE POWER COMPANY, 1971, 401 U.S 424, 430-1, 91 S CT. 849, 853.

CO-OPERATION AND VOLUNTARY COMPLIANCE WERE SELECTED AS THE PREFERRED MEANS FOR ACHIEVING THIS GOAL :

"CONGRESS CREATED THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND ESTABLISHED A PROCEDURE WHEREBY EXISTING STATE AND LOCAL EQUAL EMPLOYMENT OPPORTUNITY AGENCIES, AS WELL

AS THE COMMISSION, WOULD HAVE AN OPPORTUNITY TO SETTLE DISPUTES THROUGH CONFERENCE, CONCILIATION, AND PERSUATION BEFORE THE AGGRIEVED PARTY [IS] PERMITTED TO FILE A LAWSUIT." ALEXANDER V GARDNER-DENVER COMPANY, 1974, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017.

THE SAME LINE OF REASONING IS FOUND IN THE SUPREME COURT'S DECISION IN JOHNSON V RAILWAY EXPRESS AGENCY, 1975, 421 U.S. 454, 461, 95 S.Ct. 1716, 1720 :

"CONCILIATION AND PERSUASION THROUGH THE ADMINISTRATIVE PROCESS, TO BE SURE, OFTEN CONSTITUTE A DESIRABLE APPROACH TO SETTLEMENT OF DISPUTES BASED ON SENSITIVE AND EMOTIONAL CHARGES OF INVIDIOUS EMPLOYMENT DISCRIMINATION."

DURING THE EEOC'S CONCILIATORY AND INVESTIGATIVE PROCEDURE, THE EEOC REPRESENTATIVE, MS HEIDI D TAPMAN, MET WITH THE DEFENDANT'S REPRESENTATIVES, M/S GERALD C. ROURKE & DON CHUNKA. THE LATTER ADMITTED TO THE EEOC

THAT THE APPELLANT WAS QUALIFIED FOR THE JOB HE SOUGHT, THAT THE APPELLEE WAS DESPERATELY EAGER TO RECRUIT COMPUTER PROGRAMMERS, AND THAT A JUNIOR PROGRAMMER'S POSITION WAS OPEN. NONETHELESS, THE APPELLEE REFUSED TO INTERVIEW THE APPELLANT FOR THE OPENING (D 27, EXHIBIT F).**

IN SHORT, THE APPELLEE SPURNED CONCILIATORY SOLUTIONS — A STEP TANTAMOUNT TO VIOLATING THE SPIRIT AND LETTER OF THE LAW.

** REFERENCE TO THE RECORD WILL BE MADE BY DOCUMENT NUMBER ON THE DOCKET SHEET, AND BY PAGE: "D , P ".

POINT I LEAVE TO AMEND PLEADING IS FREELY GIVEN WHEN JUSTICE SO REQUIRES

THE APPELLANT IS AN ENGINEER, AND A LAYMAN IN MATTERS OF LAW. THE SUPREME COURT HAS LONG RECOGNIZED THAT "EVEN THE INTELLIGENT AND EDUCATED LAYMAN HAS SMALL AND SOMETIMES NO SKILL IN THE SCIENCE OF LAW." POWELL V ALABAMA, 1932, 287 U.S. 45, 69, 53 S.Ct. 55, 64.

THE APPELLANT'S ASSUMPTION WAS THAT THE ORIGINAL CHARGE OF DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN DID IN FACT TAKE INTO ACCOUNT HIS BEING NON-WHITE (COLOR), NON-CHRISTIAN (RELIGION), AND A NON-CITIZEN (ALIENAGE). WHEN THE APPELLANT REALIZED THE DEFICIENCY IN HIS COMPLAINT, HE MOVED TO AMEND THE COMPLAINT TO INCLUDE A CAUSE OF ACTION UNDER 42 USCA 1981, AND ALSO TO ADD ADDITIONAL GROUNDS OF DISCRIMINATION (D 17).

RULE 15(a) OF THE FEDERAL RULES OF CIVIL

PROCEDURE PROVIDES IN PERTINENT PART THAT "A PARTY MAY AMEND HIS PLEADING ONLY BY LEAVE OF COURT . . . ; AND LEAVE SHALL BE FREELY GIVEN WHEN JUSTICE SO REQUIRES."

THE APPLICABLE STANDARD FOR DETERMINING WHETHER TO GRANT LEAVE FOR THE FILING OF AN AMENDED COMPLAINT HAS BEEN STATED BY THE SUPREME COURT :

"THE APPLICABLE RULE IS RULE IS OF THE FEDERAL RULES OF CIVIL PROCEDURE. WHICH WAS DESIGNED TO FACILITATE THE AMENDMENT OF PLEADINGS EXCEPT WHERE PREJUDICE TO THE OPPOSING PARTY WOULD RESULT." UNITED STATES V HOUGHAM, 1960, 364 U.S 310, 316, 81 S.Ct. 13, 18; SEE ALSO ZENITH RADIO CORPORATION V HAZELTINE RESEARCH, INC., 1971, 401 U.S. 321, 330-1, 91 S.Ct. 795, 802

MOREOVER, THIS IS PARTICULARLY APPLICABLE WHEN THE APPELLANT IS APPEARING PRO SE, AND THE COMPLAINT IS HELD "TO LESS STRINGENT STANDARDS THAN FORMAL PLEADINGS DRAFTED BY

LAWYERS . . . ." HAINES V KERNER, 1972, 404 U.S. 519, 520, 92 S.Ct. 594, 596; ESTELLE V GAMBLE, 1976, U.S. , , 97 S.Ct. 285, 292.

THE CRITICAL ELEMENT, THEREFORE, IN DETERMINING WHETHER TO GRANT LEAVE TO FILE AN AMENDED COMPLAINT IS PREJUDICE TO THE OPPOSING PARTY. JAKOBSEN V MASSACHUSETTS PORT AUTHORITY, 520 F.2d 810, 813, CA 1 1975; CLARK V UNIVERSAL BUILDERS, INC., 501 F.2d 324, 339, CA 7 1974, CERT. DEN. 1974, 419 U.S. 1020, 95 S.Ct. 657; HAGEMAN V SIGUAL L.P. GAS, INC., 486 F.2d 479, 484, CA 6 1973; HOVEY V UNITED STATES, 481 F.2d 1187, 1190, CA 9 1973; STRAUSS V DOUGLAS AIRCRAFT COMPANY, 404 F.2d 1152, 1155, CA 2 1968; HANSON V HUNT OIL COMPANY, 398 F.2d 578, 582, CA 8 1968; SUNRAY OIL CORPORATION V SHARPE, 209 F.2d 937, 939, CA 5 1954; KERRIGAN'S ESTATE V SEAGRAM & SONS, INC., 199 F.2d 694, 696, CA 3 1952.

IN THE INSTANT ACTION, NO PREJUDICE COULD

RESULT TO THE APPELLEE IF THE APPELLANT IS ALLOWED TO FILE AN AMENDED COMPLAINT.

FURTHERMORE, THE APPELLANT MAY RESPECTFULLY POINT OUT THAT THE "LEGISLATIVE ENACTMENTS IN [THE AREA OF EMPLOYMENT DISCRIMINATION] HAVE LONG EVINCED A GENERAL INTENT TO ACCORD PARALLEL OR OVERLAPPING REMEDIES AGAINST DISCRIMINATION," ALEXANDER V GARDNER-DENVER COMPANY, 1974, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, AND THAT "THE FILING OF A TITLE VII CHARGE AND RESORT TO TITLE VII'S ADMINISTRATIVE MACHINERY ARE NOT PREREQUISITES FOR THE INSTITUTION OF A SECTION 1981 ACTION." JOHNSON V RAILWAY EXPRESS AGENCY, 1975, 421 U.S. 454, 460, 95 S.Ct. 1716, 1720.

INSPITE OF THAT THE TRIAL COURT DENIED LEAVE TO THE APPELLANT TO FILE AN AMENDED COMPLAINT TO INCLUDE A CAUSE OF ACTION UNDER SECTION 1981 (D 35), ALTHOUGH THE APPELLANT — WHO IS NEITHER WHITE NOR A CITIZEN OF THE UNITED STATES, BUT A RESIDENT

ALIEN WHO FALLS WITHIN THE JURISDICTION OF THE UNITED STATES — HAS THE SAME RIGHT TO MAKE AND ENFORCE EMPLOYMENT CONTRACTS AS IS ENJOYED BY WHITE CITIZENS. MCDONALD V SANTA FE TRAIL TRANSPORTATION COMPANY, 1976, U.S. , 96 S.CT. 2574, 2586 ; TAKAHASHI V FISH & GAME COMMISSION, 1968, 334 U.S. 410, 419, 68 S.CT. 1138, 1142-3.

"OF COURSE, THE GRANT OR DENIAL OF AN OPPORTUNITY TO AMEND IS WITHIN THE DISCRETION OF THE DISTRICT COURT . . . ." FOMAN V DAVIS, 1962, 371 U.S. 178, 182, 83 S.CT. 227, 230. SEE ALSO ZENITH RADIO CORPORATION V HAZELTINE RESEARCH, INC. 1971, 401 U.S. 321, 330, 91 S.CT. 795, 802.

BUT SUCH A DISCRETIONARY CHOICE IS NOT LEFT TO A COURT'S "INCLINATION", BUT TO ITS JUDGMENT ; AND ITS JUDGMENT IS TO BE GUIDED BY SOUND LEGAL PRINCIPLES." UNITED STATES V BURR, 1807, 25 FEDERAL CASES NO. 14,692 D. PP 30, 35 (MARSHALL, C.J.).

"OUTRIGHT REFUSAL TO GRANT THE LEAVE [TO AMEND THE COMPLAINT] WITHOUT ANY JUSTIFYING REASON APPEARING FOR THE DENIAL IS NOT AN EXERCISE OF DISCRETION; IT IS MERELY ABUSE OF THAT DISCRETION AND INCONSISTENT WITH THE SPIRIT OF THE FEDERAL RULES." FOMAN V DAVIS, supra, 371 U.S. at 182, 83 S.Ct. at 230.

AS SUCH IT IS APPARENT THAT THE COURT BELOW ABUSED ITS DISCRETION IN DENYING LEAVE TO THE APPELLANT TO FILE AN AMENDED COMPLAINT AND THAT THE SAID DECISION SHOULD BE REVERSED.

POINT II

OPEN DISCLOSURE OF ALL POTENTIALLY RELEVANT INFORMATION IN THE ADVERSARY SYSTEM OF JUSTICE IS BOTH FUNDAMENTAL AND COMPREHENSIVE

CONGRESS ENACTED TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 "TO ACHIEVE EQUALITY OF EMPLOYMENT OPPORTUNITIES AND REMOVE BARRIERS THAT HAVE OPERATED IN THE PAST TO FAVOR AN IDENTIFIABLE GROUP OF WHITE [APPLICANTS] OVER OTHER [APPLICANTS FOR EMPLOYMENT]." GRIGGS V DUKE POWER COMPANY, 1971, 401 U.S. 424, 429-30, 91 S.Ct. 849, 853

HOWEVER, "THE ACT DOES NOT COMMAND THAT ANY PERSON BE HIRED SIMPLY BECAUSE HE . . . IS A MEMBER OF A MINORITY GROUP." Id., 401 U.S. at 430-1, 91 S.Ct. at 853.

"INDEED, THE VERY PURPOSE OF TITLE VII IS TO PROMOTE HIRING ON THE BASIS OF JOB QUALIFICATIONS, RATHER THAN ON THE BASIS OF [COLOR, OR RELIGION, OR NATIONAL ORIGIN]." Id.

401 U.S. at 434, 91 S.Ct. at 855.

THE APPELLANT HAS BEEN SEEKING EMPLOYMENT WITH THE APPELLEE EVER SINCE HE IMMIGRATED TO THE UNITED STATES (D 5, P 2, PARA 5). AND ALTHOUGH HIS BACKGROUND — PROFICIENCY IN ASSEMBLY LANGUAGE, AND ALSO EXPERIENCE IN MINI-COMPUTERS AND IBM SYSTEM 360 (D 27, EXHIBIT A) — PERFECTLY MATCHED A GREAT MANY OF THE APPELLEE'S JOB REQUIREMENTS OVER THE LAST SEVEN YEARS (D 27, EXHIBIT K), HE HAS NEVER BEEN CONSIDERED FOR A JOB (D 26, P3, PARA 6). THE APPELLEE CONTENDS, HOWEVER, THAT THE PROGRAMMERS AND ANALYSTS HIRED DURING THIS PERIOD POSSESSED QUALIFICATIONS SUPERIOR TO THOSE OF THE APPELLANT (D 24).

THE INTERROGATORIES PROPOUNDED BY THE APPELLANT PRIMARILY CALL FOR THE QUALIFICATIONS OF THE PROGRAMMERS AND ANALYSTS HIRED BY THE APPELLEE OVER THE LAST SEVEN YEARS (D 5). THE APPELLEE OBJECTED TO ANSWER ON GROUNDS OF IRRELEVANCE, BURDENSOMENESS, ETC. (D 12). AND THE TRIAL COURT

SUSTAINED THOSE OBJECTIONS ON THE GROUND THAT THE INFORMATION SOUGHT WOULD HAVE LIMITED PROBATIVE VALUE ON THE APPELLANT'S CASE (D 18).

YET THE APPELLEE STATES "IT IS JUST AS VALID TO ASSUME, CONCLUDE AND PRESUME THAT [THE APPELLANT] WAS UNQUALIFIED FOR THE POSITION, THAT [THE APPELLANT] WAS THE LEAST QUALIFIED APPLICANT, THAT [THE APPELLANT] WAS WELL QUALIFIED BUT THERE WAS A MORE QUALIFIED CANDIDATE, OR THAT [THE APPELLEE] DECIDED NOT TO FILL THE POSITION FOR ECONOMIC OR OTHER REASONS" (D 25, P 14 & 15).

THEREFORE, IN ORDER TO ELIMINATE ANY ASSUMPTION AND PRESUMPTION, THE APPELLANT THEN MADE A REQUEST FOR PRODUCTION OF DOCUMENTS TO ENABLE HIM TO EXAMINE AND COPY THE PERSONNEL RECORDS OF THE COMPUTER PROGRAMMERS AND ANALYSTS HIRED BY THE APPELLEE OVER THE LAST SEVEN YEARS (D 40). THE APPELLEE FURTHER OBJECTED TO THE SAID REQUEST ON GROUNDS OF IRRELEVANCE AND

BURDENSOMENESS (D 41). AND THE TRIAL COURT SUSTAINED THOSE OBJECTIONS (D 48).

IT IS WELL RECOGNIZED THAT A LAWSUIT IS NOT A CONTEST IN CONCEALMENT, AND THAT THE DISCOVERY PROCESS WAS ESTABLISHED SO THAT "EITHER PARTY MAY COMPEL THE OTHER TO DISGORGE WHATEVER FACTS HE HAS IN HIS POSSESSION." HICKMAN V TAYLOR 1947. 329 U.S. 495, 507, 67 S.Ct. 385, 392.

THE BROAD SCOPE OF DISCOVERY, AS ARTICULATED IN THE TEXT, IS ALSO REFLECTED IN AN OPINION BY JUDGE LEAHY SHORTLY AFTER THE ADOPTION OF THE FEDERAL RULES OF CIVIL PROCEDURE:

> "UNLESS IT IS PALPABLE THAT THE EVIDENCE SOUGHT CAN HAVE NO POSSIBLE BEARING UPON THE ISSUES, THE SPIRIT OF THE NEW RULES CALLS FOR EVERY RELEVANT FACT, HOWEVER REMOTE, TO BE BROUGHT OUT FOR THE INSPECTION NOT ONLY OF THE OPPOSING PARTY BUT FOR THE BENEFIT OF THE COURT WHICH IN DUE COURSE CAN ELIMINATE THOSE FACTS WHICH ARE NOT TO BE CONSIDERED

IN DETERMINING THE ULTIMATE ISSUES". HERCULES POWDER COMPANY V ROHM & HAAS COMPANY, 3 F.R.D. 302, 304, DC DE 1943.

MOREOVER, THE SUPREME COURT MADE IT CLEAR THAT THE "DISCOVERY RULES ARE TO BE ACCORDED A BROAD AND LIBERAL TREATMENT," AND THAT "MUTUAL KNOWLEDGE OF ALL THE RELEVANT FACTS GATHERED BY BOTH PARTIES IS ESSENTIAL TO PROPER LITIGATION." HICKMAN V TAYLOR, supra, 329 U.S. at 507, 67 S.Ct. at 392.

BESIDES, "CIVIL TRIALS IN THE FEDERAL COURTS NO LONGER NEED BE CARRIED ON IN THE DARK." Id 329 U.S. at 501, 67 S.Ct. at 389. THEREFORE, THE SUPREME COURT MANDATED THAT "ON . . . [TRIAL] [THE APPELLANT] MUST BE GIVEN A FULL AND FAIR OPPORTUNITY TO DEMONSTRATE BY COMPETENT EVIDENCE THAT THE PRESUMPTIVELY VALID REASONS FOR HIS REJECTION WERE IN FACT [PRETEXTUAL OR] A COVERUP FOR A . . . DISCRIMINATORY DECISION." MCDONNELL DOUGLAS CORPORATION V GREEN, 1973.

411 U.S. 792, 802, 93 S.Ct. 1817, 1826.

THE SUPREME COURT HAS ALSO GIVEN CLEAR GUIDELINES ON THE <u>COMPETENT EVIDENCE</u> RELEVANT TO A JOB-BIAS COMPLAINANT TO ANY SHOWING OF PRETEXTUALITY :

> "STATISTICS AS TO [THE EMPLOYER'S] EMPLOYMENT POLICY AND PRACTICE MAY BE HELPFUL TO A DETERMINATION OF WHETHER [THE EMPLOYER'S] REFUSAL TO [HIRE] [THE APPLICANT] . . . CONFORMED TO A GENERAL PATTERN OF DISCRIMINATION AGAINST [MINORITIES]." Id., 411 U.S. at 805, 93 S.Ct. at 1825.

THE INFORMATION SOUGHT BY THE APPELLANT THROUGH INTERROGATORIES AND PRODUCTION OF DOCUMENTS CALLS FOR THE STATISTICS AS TO THE APPELLEE'S EMPLOYMENT POLICY AND PRACTICE. FAR FROM BEING BURDENSOME OR IRRELEVANT, THE INTERROGATORIES AND THE REQUESTED DOCUMENTS ARE ENTIRELY "RELEVANT TO THE SUBJECT MATTER INVOLVED IN THE PENDING ACTION," AND THAT

"THE INFORMATION SOUGHT APPEARS REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE." RULE 26(b)(1), FEDERAL RULES OF CIVIL PROCEDURE. SEE ALSO TABATCHNICK V G.D. SEARLE & COMPANY, 67 F.R.D. 49, 54, DC NJ 1975; UNITED STATES V INTERNATIONAL BUSINESS MACHINES CORPORATION, 66 F.R.D. 215, 218, SD NY 1974; SAYRE V ABRAHAM LINCOLN FEDERAL SAVINGS & LOAN ASSOCIATION, 65 F.R.D. 379, 382, ED PA 1974; ROTO-FINISH COMPANY V ULTRAMATIC EQUIPMENT COMPANY, 60 F.R.D. 571, 572, ND IL 1973; FRANKS V NATIONAL DAIRY PRODUCTS CORPORATION, 41 F.R.D. 236, 238, WD TX 1966; UNITED STATES V A.B DICK COMPANY, 7 F.R.D. 612, 613, ND OH 1967; KAPLAN V INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, 525 F.2d 1354, 1358, CA 9 1975; RODRIGUEZ V EAST TEXAS MOTOR FREIGHT, 505 F.2d 40, 53, CA 5 1974; JONES V LEE WAY MOTOR FREIGHT, 431 F.2d 245, 247, CA 10 1970; UNITED STATES V

PROCTER & GAMBLE COMPANY, 1958, 356 U.S. 677, 682-3, 78 S.Ct. 983, 986-7.

THE COURT SHOULD BEAR IN MIND THAT "THE NEED TO DEVELOP ALL RELEVANT FACTS IN THE ADVERSARY SYSTEM IS BOTH FUNDAMENTAL AND COMPREHENSIVE." UNITED STATES V NIXON, 1974, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108.

IN ADDITION, "THE EXPERIENCE OF THE FEDERAL COURTS OVER THE LAST TWO DECADES HAS BEEN THAT . . . DISCRIMINATION IN EMPLOYMENT . . . IS OFTEN SUBTLE AND NOT EASILY PROVED. THE CONSEQUENCES OF SUCH DISCRIMINATION ARE MOST GRAVE, BOTH FOR THE INDIVIDUAL VICTIM AND FOR SOCIETY AT LARGE. BOOTH V PRINCE GEORGE'S COUNTY, MARYLAND, 66 F.R.D. 466, 473, DC MD 1975.

THEREFORE, THE NECESSITY FOR LIBERAL DISCOVERY TO CLARIFY THE COMPLEX ISSUES ENCOUNTERED IN LITIGATION SEEKING TO REDRESS EMPLOYMENT DISCRIMINATION HAS BEEN WIDELY RECOGNIZED. BURNS V THIOKOL CHEMICAL CORPORATION, 483 F.2d

300, CA 5 1973.

IT IS A WELL-ESTABLISHED DOCTRINE THAT THE SCOPE AND CONDUCT OF DISCOVERY ARE WITHIN THE SOUND DISCRETION OF THE TRIAL JUDGE. BAKER V F & F INVESTMENT, 470 F.2D 778, 781, CA 2 1972, CERT. DEN. 1973, 411 U.S. 966, 93 S.CT. 2147; MONTECATINI EDISON S.P.A. V E.I. DU PONT DE NEMOURS & COMPANY, 434 F.2D 70, 72, CA 3 1970; SOUTHERN RAILWAY COMPANY V LANHAM, 403 F.2D 119, 126, CA 5 1968; TIEDMAN V AMERICAN PIGMENT CORPORATION, 253 F.2D 803, 808, CA 4 1958; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION V HAYDEN, 231 F.2D 595, 606, CA 9 1956; SHER V DE HAVEN, 199 F.2D 777, 781, CA DC 1952; ATLANTIC GREYHOUND CORPORATION V LAURITZEN, 182 F.2D 540, 542, CA 6 1950.

"BUT THE JUDGE'S DISCOVERY RULINGS, LIKE HIS OTHER PROCEDURAL DETERMINATIONS, ARE NOT ENTIRELY SACROSANCT. IF HE FAILS TO ADHERE TO THE LIBERAL SPIRIT OF THE RULES, [THE APPELLATE COURT] MUST REVERSE." BURNS V THIOKOL

CHEMICAL CORPORATION, supra, 483 F. 2d at 305.

THE COURT SHOULD EVER BE MINDFUL THAT "THE VERY INTEGRITY OF THE JUDICIAL SYSTEM AND PUBLIC CONFIDENCE IN THE SYSTEM DEPEND ON FULL DISCLOSURE OF ALL THE FACTS, WITHIN THE FRAMEWORK OF THE RULES OF EVIDENCE." UNITED STATES V NIXON, supra, 418 U.S. at 709, 94 S.Ct. at 3108.

AS SUCH IT IS APPARENT THAT THE COURT BELOW ABUSED ITS DISCRETION IN DENYING DISCOVERY TO THE APPELLANT, AND THAT THE SAID DECISION SHOULD BE REVERSED.

POINT III ATTORNEYS' FEES ARE USUALLY AWARDED TO PRIVATE ATTORNEYS GENERAL WHO VINDICATE POLICIES GRANTED HIGH PRIORITY BY CONGRESS AND NOT TO CORPORATE DEFENDANTS WHO VIOLATE LAW OF THE LAND

IN AMERICAN JURISPRUDENCE, THE TRADITIONAL RULE HAS BEEN THAT ATTORNEYS' FEES ARE NOT ORDINARILY RECOVERABLE AS COSTS. RUNYON V MCCRARY, 1976, U.S. , , 96 S.Ct. 2586, 260

"IN SUPPORT OF THE AMERICAN RULE, IT HAS BEEN ARGUED THAT SINCE LITIGATION IS AT BEST UNCERTAIN ONE SHOULD NOT BE PENALIZED FOR MERELY DEFENDING OR PROSECUTING A LAWSUIT, AND THAT THE POOR MIGHT BE UNJUSTLY DISCOURAGED FROM INSTITUTING ACTIONS TO VINDICATE THEIR RIGHTS IF THE PENALTY FOR LOSING INCLUDED THE FEES OF THEIR OPPONENTS' COUNSEL." FLEISCHMANN DISTILLING CORPORATION V MAIER BREWING COMPANY, 1967, 386 U.S. 714, 718, 88 S Ct. 1404, 1407.

"WHAT CONGRESS HAS DONE, HOWEVER, WHILE FULLY RECOGNIZING AND ACCEPTING THE GENERAL RULE, IS ITSELF TO MAKE SPECIFIC AND EXPLICIT PROVISIONS FOR THE ALLOWANCE OF ATTORNEYS' FEES UNDER SELECTED STATUTES GRANTING OR PROTECTING VARIOUS FEDERAL RIGHTS." ALYESKA PIPELINE SERVICE COMPANY V WILDERNESS SOCIETY, 1975, 421 U.S. 240, 260, 95 S.Ct. 1612, 1623.

"IT IS TRUE THAT UNDER SOME, IF NOT MOST, OF THE STATUTES PROVIDING FOR THE ALLOWANCE OF REASONABLE FEES, CONGRESS HAS OPTED TO RELY HEAVILY ON PRIVATE ENFORCEMENT TO IMPLEMENT PUBLIC POLICY AND TO ALLOW COUNSEL FEES SO AS TO ENCOURAGE PRIVATE LITIGATION." ID., 421 U.S. at 263, 95 S.Ct. at 1624.

"THE AMERICAN RULE HAS NOT SERVED, HOWEVER, AS AN ABSOLUTE BAR TO THE SHIFTING OF ATTORNEYS' FEES EVEN IN THE ABSENCE OF STATUTE OR CONTRACT." F.D. RICH COMPANY V INDUSTRIAL LUMBER COMPANY, 1974, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165; SEE ALSO

HALL V COLE, 1973, 412 U.S. 1, 4-5, 93 S.Ct. 1943, 1945-6

THEREFORE, IT WOULD BE WITHIN THE POWER OF A COURT OF EQUITY TO DIRECT PAYMENT OF AN OPPONENT'S ATTORNEY'S FEES IF REQUIRED BY "DOMINATING REASONS OF JUSTICE." SPRAGUE V TICONIC NATIONAL BANK, 1939, 307 U.S. 161, 167, 59 S.Ct. 777, 780; UNIVERSAL OIL PRODUCTS COMPANY V ROOT REFINING COMPANY, 1946, 328 U.S 575, 580, 66 S.Ct. 1176, 1179.

"EQUITY ESCHEWS MECHANICAL RULES ... [AND] DEPENDS ON FLEXIBILITY." HOLMBERG V ARMBRECHT, 1946, 327 U.S. 392, 396, 66 S.Ct. 582, 584. "THE ESSENCE OF EQUITY JURISDICTION HAS BEEN THE POWER OF THE CHANCELLOR TO DO EQUITY AND TO MOULD EACH DECREE TO THE NECESSITIES OF THE PARTICULAR CASE." HECHT COMPANY V BOWLES, 1944, 321 U.S. 321, 329, 64 S.Ct. 587, 592. AS SUCH THE POWER TO AWARD ATTORNEYS' FEES "IS PART OF THE ORIGINAL AUTHORITY OF THE CHANCELLOR TO DO EQUITY

IN A PARTICULAR SITUATION." SPRAGUE V TICONIC NATIONAL BANK, supra, 307 U.S. at 166, 59 S.Ct. at 780, AND FEDERAL COURTS DO NOT HESITATE TO EXERCISE THIS INHERENT EQUITABLE POWER WHENEVER "OVERRIDING CONSIDERATIONS INDICATE THE NEED FOR SUCH A RECOVERY." MILLS V ELECTRIC AUTO-LITE COMPANY, 1970, 396 U.S. 375, 391.2, 90 S.Ct. 616, 625.

THE SUPREME COURT, IN F.D. RICH COMPANY V INDUSTRIAL LUMBER COMPANY, supra, 417 U.S. at 129-30, 94 S.Ct. at 2165, SETS FORTH THREE GENERAL CATEGORIES OF SITUATIONS WHEN THE EQUITABLE POWER TO AWARD ATTORNEYS' FEES IS USUALLY CONSIDERED

1. WHERE THERE HAS BEEN BAD FAITH, VEXATION, OR OPPRESSION. IN THIS CLASS OF CASES THE PUNITIVE ASPECTS PREDOMINATE. SEE ALSO AWARDS OF ATTORNEY'S FEES TO LEGAL AID OFFICES, 87 HARV. L. REV. 611, 619 (1973).

2. WHERE A COMMON FUND HAS BEEN CREATED, OR CLOSELY ANALOGOUS TO THIS, WHERE A DEFINABLE

CLASS BENEFITS FROM THE LITIGATION AND AN AWARD ENABLES THE COURT TO SPREAD THE EXPENSE AMONG ALL WHO BENEFIT. SEE ALSO THE ALLOCATION OF ATTORNEY'S FEES AFTER MILLS V ELECTRIC AUTO-LITE COMPANY, 38 U. CHI. L. REV. 316, 319 (1971).

3. WHERE THE PRIVATE ATTORNEY GENERAL THEORY MAY HAVE APPLICATION —— THAT IS, WHERE THE LITIGATION WAS INSTITUTED TO VINDICATE A POLICY GRANTED A HIGH PRIORITY BY A CONGRESSIONAL ACTION. SEE ALSO ATTORNEY'S FEES IN PUBLIC INTEREST LITIGATION, 48 N.Y.U.L. REV. 301, 318 (1973).

IN THE INSTANT ACTION, THE CRITERIA CITED ABOVE FOR AWARDING COUNSEL FEES DO NOT LEAN IN FAVOR OF THE DEFENDANT. ON THE CONTRARY, THEY CLEARLY GO IN FAVOR OF THE PLAINTIFF.

IF WELL KNOWN STATUTORY GUARANTEES CONTINUE TO BE IGNORED OR ABRIDGED, AND INDIVIDUAL VICTIMS OF DISCRIMINATION ARE FORCED TO RESORT TO COURTS FOR PROTECTION, IT WOULD

BE NECESSARY FOR ADDITIONAL SANCTION OF SUBSTANTIAL ATTORNEYS' FEES TO BE AWARDED BY THE COURTS. THE TIME HAS COME WHEN RECALCITRANT EMPLOYERS CAN FORCE VICTIMS OF DISCRIMINATION TO BEAR THE CONSTANT AND CRUSHING EXPENSE OF ENFORCING THEIR STATUTORILY ACCORDED RIGHTS. THE FULFILLMENT OF STATUTORY GUARANTEES, WHICH ALTER A KEY SOCIAL INSTITUTION, AND CAUSES REPERCUSSIONS THROUGHOUT THE COMMUNITY, IS NOT A PRIVATE MATTER. UNDER THE CIVIL RIGHTS ACTS COURTS ARE REQUIRED FULLY TO REMEDY AN ESTABLISHED WRONG. AND THE PAYMENT OF FEES AND EXPENSES IS A NECESSARY INGREDIENT OF SUCH A REMEDY.

CONSEQUENTLY, THE SUCCESSFUL PLAINTIFF IN A JOB BIAS ACTION "SHOULD ORDINARILY RECOVER AN ATTORNEY'S FEE UNLESS SPECIAL CIRCUMSTANCES WOULD RENDER SUCH AN AWARD UNJUST." NEWMAN V PIGGIE PARK ENTERPRISES, 1968, 390 U.S. 400, 402, 88 S.Ct. 964, 966; NORTHCROSS V MEMPHIS BOARD OF EDUCATION, 1973. 412 U.S. 427, 428, 93 S.Ct. 2201, 2202.

SEE ALSO PARHAM V SOUTHWESTERN BELL TELEPHONE COMPANY, 433 F.2d 421, 429-30, CA 8 1970; LEA V CONE MILLS CORPORATION, 438 F.2d 86, 88, CA 4 1971; SCHAEFFER V SAN DIEGO YELLOW CABS, 462 F.2d 1002, 1008, CA 9 1972; BRITO V ZIA COMPANY, 478 F.2d 1200, 1206, CA 10 1973; JOHNSON V GEORGIA HIGHWAY EXPRESS, 488 F.2d 714, 716, CA 5 1974; EVANS V SHERATON PARK HOTEL, 503 F.2d 177, 186, CA DC 1974; SINGER V MAHONING COUNTY BOARD OF MENTAL RETARDATION, 519 F.2d 748, 749, CA 6 1975; EEOC V ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638, 542 F.2d 579, 592, CA 2 1976; 110 CONG. REC. 12724 (1964)(REMARKS OF SEN. HUMPHREY).

OTHERWISE, "IF FORCED TO BEAR THE BURDEN OF ATTORNEYS' FEES, FEW AGGRIEVED PERSONS WOULD BE IN A POSITION TO SECURE THEIR AND THE PUBLIC'S INTERESTS IN [ENFORCING IMPORTANT PUBLIC POLICIES]." BRADLEY V RICHMOND SCHOOL BOARD, 1974, 416 U.S. 696, 708, 94 S.Ct. 2006, 2014.

THE APPELLANT IS NOT AWARE OF A SINGLE

INSTANCE (OTHER THAN HALDER V QUOTRON SYSTE 74 C 1376, ED OF NY) WHERE A TRIAL COURT HAS AWARDED ATTORNEY'S FEES TO A CORPORATE DEFENDANT, WHERE THE DEFENDANT'S OBSTINATE, ADAMANT, AND OPEN RESISTANT TO THE LAW HAS FORCED THE PLAINTIFF TO RESORT TO COURT FOR PROTECTION.

MOREOVER, "A ROUTINE ALLOWANCE OF ATTORNEY FEES TO SUCCESSFUL DEFENDANTS IN DISCRIMINATION SUITS MIGHT EFFECTIVELY DISCOURAGE SUITS IN ALL BUT THE CLEAREST CASES, AND INHIBIT EARNEST ADVOCACY ON UNDECIDED ISSUES." US STEEL CORPORATION V UNITED STATES, 519 F.2d 359, 366 5, CA 3 1975. SEE ALSO WRIGHT V STONE CONTAINER CORPORATION, 524 F.2d 1058, 1066, CA 8 1975.

AS SUCH IT IS APPARENT THAT THE COURT BELOW ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES TO THE APPELLEE, AND THAT THE SAID DECISION SHOULD BE REVERSED.

POINT IV DISMISSAL OF THE COMPLAINT FOR LACK OF PROSECUTION WHILE THE PLAINTIFF HAS BEEN PROSECUTING VIGOROUSLY AND DILIGENTLY IS NOTHING BUT JUDICIAL USURPATION AND OPPRESSION AND CAN NEVER BE UPHELD WHERE JUSTICE IS JUSTLY ADMINISTERED

THE TRIAL COURT HAS THE DISCRETION, UNDER RULE 41(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, TO DISMISS A COMPLAINT, WITH PREJUDICE, FOR FAILURE TO PROSECUTE. LINK V WABASH RAILROAD COMPANY, 1962, 370 U.S. 626, 629, 82 S.Ct. 1386, 1389; REDFIELD V YSTALYFERA IRON COMPANY, 1884, 110 U.S. 174, 176, 3 S.Ct. 570, 576; CONNOLLY V PAPACHRISTID SHIPPING LIMITED, 504 F.2d 917, 920, CA 5 1974; VINDIGNI V MEYER, 441 F.2d 376, 377, CA 2 1971; MEEKER V RIZLEY, 324 F.2d 269, 271, CA 10 1963.

BUT DISMISSAL IS A HARSH SANCTION, AND

SHOULD BE RESORTED TO ONLY IN EXTREME SITUATIONS. SEARVER V ALLEN, 457 F.2d 308, 310, CA 7 1972; POND V BRANIFF AIRWAYS, 453 F.2d 347, 349, CA 5 1972; MCCOMBS V PITTSBURGH-DES MOINES STEEL COMPANY, 426 F.2d 264, 266, CA 10 1970; SYRACUSE BROADCASTING CORPORATION V NEWHOUSE, 271 F.2d 910, 914, CA 2 1959. BECAUSE RULE 41(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE HAS DIRECTLY REVERSED EQUITY'S TRADITIONAL DOCTRINE THAT A DISMISSAL WITHOUT CONSIDERATION OF THE MERITS IS ALSO WITHOUT PREJUDICE TO THE COMPLAINANT. SWAN LAND & CATTLE COMPANY V FRANK, 1893, 148 U.S. 603, 612, 13 S CT. 691, 694.

COURTS INTERPRETING THE RULE UNIFORMLY HOLD THAT IT CANNOT BE AUTOMATICALLY OR MECHANICALLY APPLIED. AGAINST THE POWER TO PREVENT DELAYS MUST BE WEIGHED THE SOUND PUBLIC POLICY OF DECIDING CASES ON THEIR MERITS. DYOTHERM CORPORATION V TURBO MACHINE

COMPANY, 392 F.2d 146, 149, CA 3 1968; DAVIS V OPERATION AMIGO, INC., 378 F.2d 101, 103, CA 10 1967; COUNCIL OF FEDERATED ORGANIZATIONS V MIZE, 339 F.2d 898, 901, CA 5 1964. CONSEQUENTLY, DISMISSAL MUST BE TEMPERED BY A CAREFUL EXERCISE OF JUDICIAL DISCRETION. RICHMAN V GENERAL MOTORS CORPORATION, 437 F.2d 196, 199, CA 1 1971; BROWN V THOMPSON, 430 F.2d 1214, 1217, CA 5 1970.

WHILE THE PROPRIETY OF DISMISSAL ULTIMATELY TURNS ON THE FACTS ON EACH CASE, CRITERIA FOR JUDGING WHETHER THE DISCRETION OF THE TRIAL COURT HAS BEEN SOUNDLY EXERCISED HAVE BEEN STATED FREQUENTLY. NAVARRO V CHIEF OF POLICE, DES MOINES, IOWA, 523 F.2d 214, 216-8, CA 8 1975; REIZAKIS V LOY, 490 F.2d 1132, 1135, CA 6 1974; FLAKSA V LITTLE RIVER MARINE CONSTRUCTION COMPANY, 389 F.2d 885, 887-9, CA 5 1968, CERT. DEN. 1968, 392 U.S. 928, 88 S.Ct. 2287

IT HAS BEEN OBSERVED THAT WHILE DISMISSAL IS A DISCRETIONARY MATTER, THE DECIDED CASES "HAVE GENERALLY PERMITTED IT ONLY IN THE FACE OF A CLEAR RECORD OF DELAY OR CONTUMACIOUS CONDUCT BY THE PLAINTIFF." DURHAM V FLORIDA EAST COAST RAILWAY COMPANY, 385 F.2D 366, 368, CA 5 1967.

THE APPELLATE COURTS FREQUENTLY HAVE FOUND ABUSE OF DISCRETION WHEN TRIAL COURTS FAILED TO APPLY SANCTIONS LESS SEVERE THAN DISMISSAL. COON V CHARLES W. BLIVEN & COMPANY, 534 F.2D 44, 49, CA 5 1976; INDUSTRIAL BUILDING MATERIALS, INC. V INTERCHEMICAL CORPORATION, 437 F.2D 1336, 1339, CA 9 1970.

ALSO, LACK OF PREJUDICE TO THE DEFENDANT, THOUGH NOT A BAR TO DISMISSAL, IS A FACTOR THAT SHOULD BE CONSIDERED IN DETERMINING WHETHER THE TRIAL COURT EXERCISED SOUND DISCRETION. BROWN V O'LEARY, 512 F.2D 485, 486, CA 5 1975; BUSH V UNITED STATES POSTAL

SERVICE, 496 F.2D 42, 44, CA 4 1974.

FURTHERMORE, "UNDER THE CONDITIONS OF MODERN GOVERNMENT, LITIGATION MAY WELL BE THE SOLE PRACTICABLE AVENUE OPEN TO A MINORITY TO PETITION FOR REDRESS OF GRIEVANCES." N.A.A.C.P. V BUTTON, 1963, 371 U.S. 415, 430, 83 S.CT. 328, 336. THEREFORE, THE APPELLATE COURTS HAVE VIGILANTLY PROTECTED THE STATUTORY RIGHTS OF TITLE VII PLAINTIFFS AGAINST ARBITRARY DISMISSAL OF COMPLAINTS BY TRIAL COURTS. MOORE V ST. LOUIS MUSIC SUPPLY COMPANY, 539 F.2D 1191, 1194, CA 8 1976; BOAZMAN V ECONOMICS LABORATORY, INC., 537 F.2D 210, 212-3, CA 5 1976.

IN THE INSTANT ACTION, THE APPELLANT HAS BEEN VIGOROUSLY AND DILIGENTLY PROSECUTING HIS CLAIM THROUGHOUT. HE COMMENCED THE ACTION ON OCTOBER 31, 1974 (D2). THEREAFTER, HE PROPOUNDED INTERROGATORIES TO THE APPELLEE PRIMARILY ASKING FOR THE QUALIFICATIONS OF THE PROGRAMMERS AND ANALYSTS HIRED SINCE 1969 (D8). THE

APPELLEE REFUSED TO DISCLOSE THE INFORMATION ON GROUNDS OF IRRELEVANCE, BURDENSOMENESS, ETC. (D 12). AND THE TRIAL COURT SUSTAINED THESE OBJECTIONS (D 18). THE APPELLANT FURTHER MADE AN EFFORT TO OBTAIN THE INFORMATION THROUGH PRODUCTION OF DOCUMENTS (D 40). THE APPELLEE AGAIN OBJECTED TO SUCH PRODUCTION (D 41). THE APPELLANT THEN MOVED TO COMPEL THE APPELLEE TO PRODUCE THE REQUESTED DOCUMENTS (D 42). THE SAID MOTION WAS DENIED BY THE TRIAL COURT ON SEPTEMBER 13, 1976 (D48). TWO DAYS THEREAFTER THE TRIAL COURT DISMISSED THE ACTION FOR LACK OF PROSECUTION (D49).

THIS UTTERLY ARBITRARY, CAPRICIOUS, AND WHIMSICAL ACTION OF THE TRIAL JUDGE IS NOTHING BUT "JUDICIAL USURPATION AND OPPRESSION, AND NEVER CAN BE UPHELD WHERE JUSTICE IS JUSTLY ADMINISTERED." GALPIN V PAGE, 1873, 85 U.S (18 WALLACE) 350, 369.

IF SUCH AUTHORITY [TO DISMISS AN ACTION]

EXISTS, THEN, IN CONSEQUENCE OF THEIR ESTABLISHMENT, TO COMPEL OBEDIENCE TO LAW, AND TO ENFORCE JUSTICE, COURTS POSSESS THE RIGHT TO INFLICT THE VERY WRONGS WHICH THEY WERE CREATED TO PREVENT." HOVEY V ELLIOTT, 1897, 167 U.S. 409, 418, 17 S.Ct. 841, 844.

MOREOVER, "THERE ARE CONSTITUTIONAL LIMITATIONS UPON THE POWER OF COURTS, EVEN IN AID OF THEIR OWN VALID PROCESSES, TO DISMISS AN ACTION WITHOUT AFFORDING A PARTY THE OPPORTUNITY FOR A HEARING ON THE MERITS OF HIS CAUSE." SOCIETE INTERNATIONALE V ROGERS, 1958, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094.

SUCH ADMINISTRATION OF INJUSTICE "WOULD CONVERT THE JUDICIAL DEPARTMENT OF THE GOVERNMENT INTO AN ENGINE OF OPPRESSION, AND WOULD MAKE IT DESTROY GREAT CONSTITUTIONAL SAFEGUARDS." HOVEY V ELLIOTT, SUPRA, 167 U.S. at 419, 17 S.Ct. at 845.

THE COURT SHOULD EVER BE MINDFUL THAT

THE "RULES OF PRACTICE AND PROCEDURE ARE DEVISED TO PROMOTE THE ENDS OF JUSTICE, NOT TO DEFEAT THEM." HORMEL V HELVERING, 1941, 312 U.S. 552, 557, 61 S.Ct. 719, 721.

INDEED, THE VERY FIRST RULE OF THE FEDERAL RULES OF CIVIL PROCEDURE DIRECTS THE COURTS TO CONSTRUE THOSE RULES "TO SECURE THE JUST, SPEEDY, AND INEXPENSIVE DETERMINATION OF EVERY ACTION."

"IF RULES OF PROCEDURE WORK AS THEY SHOULD IN AN HONEST AND FAIR JUDICIAL SYSTEM, THEY NOT ONLY PERMIT, BUT SHOULD AS NEARLY AS POSSIBLE GUARANTEE THAT BONA FIDE COMPLAINTS BE CARRIED TO AN ADJUDICATION ON THE MERITS." SUROWITZ V HILTON HOTELS CORPORATION, 1966, 383 U.S. 363, 373, 86 S.Ct. 845, 851.

IT IS UNIVERSALLY RECOGNIZED THAT "WHETHER IN NAME OR NOT, THE SUIT IS PERFORCE A SORT OF CLASS ACTION FOR FELLOW [PERSONS] SIMILARLY SITUATED." JENKINS V UNITED

GAS CORPORATION. 400 F. 2d 28, 33, CA 5 1968.

THEREFORE, "THE TRIAL COURT BEARS A SPECIAL RESPONSIBILITY IN THE PUBLIC INTEREST TO RESOLVE THE DISPUTE BY DETERMINING THE FACTS REGARDLESS OF THE POSITION OF THE INDIVIDUAL PLAINTIFF." BOWE V COLGATE-PALMOLIVE COMPANY, 416 F. 2d 711, 715, CA 7 1969.

"CONGRESS, IN ENACTING TITLE VII, THOUGHT IT NECESSARY TO PROVIDE A JUDICIAL FORUM FOR THE ULTIMATE RESOLUTION OF DISCRIMINATORY EMPLOYMENT CLAIMS. IT IS THE DUTY OF COURTS TO ASSURE THE FULL AVAILABILITY OF THIS FORUM." ALEXANDER V GARDNER-DENVER COMPANY, 1974. 415 U.S. 36, 60, 94 S.Ct. 1011, 1025.

AS SUCH IT IS APPARENT THAT THE COURT BELOW ABUSED ITS DISCRETION IN DISMISSING THE COMPLAINT FOR LACK OF PROSECUTION WHILE THE APPELLANT HAS BEEN PROSECUTING IT VIGOROUSLY AND DILIGENTLY, AND THAT THE SAID DECISION SHOULD BE REVERSED.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD, IN ITS ENTIRETY, BE REVERSED.

RESPECTFULLY SUBMITTED,

Biswanath Halder

Appellant Pro Se

BISWANATH HALDER
173-17 65 AVENUE
FLUSHING, N.Y. 11365
TELEPHONE : 212-539-2305

DATED : Queens, New York

January 25, 1977

DOCKET

74 C 1552

TITLE OF CASE

BISWANATH H

APPEAL

VS.

AVIS RENT A CAR, INC.

ATTORNEYS

For Plaintiff: Pro Se 173-17 65Ave
Biswanath Halder Fresh
~~161-26 86 Crescent~~ Meadows,
~~Jamaica, N.Y. 11432~~ N.Y.
657-4366 11365

For Defendant: ENGLISH, CIANCIUI
REISMAN & PEIREZ
~~1501 Franklin Ave~~
~~160 MINEOLA BOULEVARD~~
Mineola, N.Y. 11501
516-PIL-6565

BASIS OF ACTION: CIVIL RIGHTS-EMPLOYMENT DISCRIMINATION

JURY TRIAL CLAIMED

ON

DATE	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED	DATE	DEFENDANT'S ACCOUNT	RECEIVED	DISBURSED
10-31-74	Complaint	No Fee					
1-30-75	Notice of Appeal	No Fee					

ABSTRACT OF COSTS

TO WHOM DUE	AMOUNT

RECEIPTS, REMARKS, ETC.

746 1552 HALDER vs. AVIS RENT A CAR, INC.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN ENOLUMENT RETURNS	
10-31-74	By MISHLER, CH. J. - Order dtd 10-31-74 allowing filing of summons and complaint without fee filed.	1	JS5
10-31-74	Complaint filed.	2	
11-7-74	Summons issued.		
1/18/74	Summons retd and filed Executed	3	
2/2/74	ANSWER of deft filed.	4	
2/17/74	Notice of Motion, with complaint filed.	5	
1-6-75	Affidavit in opposition filed.	6	
1/17/75	Before MISHLER, CH.J.- Case called- Motion for leave to amend- Decision reserved.	Dec.	Reserved
1-22-75	Pltff's affidavit filed.	6a	
[illegible]	Stenographer's Transcript of 1/17/75 filed.	XX	
1/31/75	Letter dated 1/[illegible]/75 filed from K. Meng to J. Mishler.	7	
2-6-75	Pltff's interrogatories to deft filed.	8	
2/25/75	By MISHLER, CH.J.- Memorandum of Decision and Order dated 2/25/75 filed that the complaint should not be dismissed and the motion to amend the complaint should be granted.	9	
	[illegible]	XXX 10 XXX	
3/8/75	Answers to Interrogatories filed.	11	
3/8/75	Objections to Interrogatories filed.	12	
3-31-75	Pltff's request to enter default filed.	13	
4-25-75	Notice of motion ret 5-2-75 for an order compelling deft to answer interrogatories filed.	14	
5-2-75	Before MISHLER, CH.J. - Case called for hearing on pltff's motion to compel deft to answer interrogatories. Motion submitted.		
5-3-75	Affidavit of M. Kathryn Meng in opposition to motion to compel answer to interrogatories filed.	15	
5-5-75	[illegible] ANSWER for filed.	16	
5/29/75	Notice of Motion, ret. 6/6/75 filed re: granting pltff leave to amend complaint, etc.	17	
6-6-75	Before MISHLER, CH.J - Case called & adj'd to 7-11-75.		
6-10-75	By MISHLER, CH. J.- Memorandum of Decision and Order dtd 6-13-75 directing deft to answer interrogatory number 1 in the manner indicated. Pltff's motion to compel answers to interrogatories 2,3,4, and 5 is denied. M/c mailed	18	
6-24-75	Notice of motion ret 7-11-75 for an order for leave to reargue filed with Memorandum of Law.	19/20	
6-26-75	Affidavit of service filed. CONTINUED	21	

CIVIL DOCKET

HALDER ● AVIS RENT A CAR, INC. ●

74 C 1552

DATE	PROCEEDINGS
7/3/75	Affidavit of S. Reisman in Opposition filed. (22)
7-7-75	Affidaivt of M. Kathryn Meng in opposition to pltff's motion to amend complaint filed. (23)
7/11/75	Before MISHLER,CH.J.- Case called- Motion submitted-Decision reserved.
8-5-75	Notice of motion and memorandum of law to dismiss complaint, ret 9-5-75 at 10 A.M. filed. (24/25)
8-27-75	Complaint and motion for other relief filed. (26)
8-27-75	Notice of cross motion to amend complaint, etc., ret 9-5-75 filed. (27)
9/3/75	Statement under Gen. Rule 9(g) with Affidavit in Opposition to Pltff's Cross-Motion filed. (28)
9/5/75	Before MISHLER,CH.J.- Case called- Pltff's motion granting pltff leave to amend the complaint, etc. submitted. - Deft's motion to dismiss,etc. submitted.
9/8/75	Letter dated 9/4/75 filed from M. K. Megg to J. Mishler. (29)
11/19/75	Notice of Motion, ret 12/5/75 filed re: issuance of prel. injunction, etc. (30)
11/19/75	Memorandum of Law filed. (31)
12-4-75	Deft's memorandum in opposition to pltff's motion for repliminary injunction filed. (mg) (32)
12-4-75	Affidavit in opposition of Seymour J. Reisman filed. (mg) (33)
12-5-75	Before MISHLER, CH. J.--Case called. Pltff's motion for a preliminary injunction submitted. Decision reserved. One week to submit reply affidavits. ---
12-16-75	Supplemental affidavit of the ppltff filed. (mg) (34)
1-23-76	By MISHLER, CH. J.--MEMORANDUM OF DECISION AND ORDER dtd 1-22-76 filed. Allmotions by pltff (to amend complaint, etc.) and deft's motion to dismiss and ofr judgment on the pleadings are denied. (p/c mailed.) (35)
1-30-76	Notice of appeal filed. Copies mailed to parties and C of A. (36)
2-3-76	ENTIRE FILE MAILED TO UNITED STATES COURT OF APPEALS.
2-9-76	Copy of letter dtd 2-5-76 from Ch.J. Mishler filed re setting date for trial: Feb. 10, 1976 at 10 A.M. (37)
2-9-76	Acknowledgment received from C of A for receipt of record on appeal filed (38)
2-10-76	Before MISHLER,J.- Case called. Adj without date for trial pending completion of discovery.
2-19-76	Defts. answers to interr. filed. (39)
3-22-76	Pltff's request to produce filed. (40)

74C 1552 HALDER vs. AVIS RENT A CAR

DATE	PROCEEDINGS	
4-21-76	Deft's answer to request to produce filed.	41
5-11-76	Sten. transcript dtd. 2-10-76 filed in 74-C-1069	
6-29-75	Motion for an order compelling deft to ~~answer interroga~~ produce documents. filed.	42
7-13-76	Notice of motion ret 8-6-76 for an order to compel defts to produce.	43
8-3-76	Affidavit in opposition to motion to compel AVIS to produce documents filed.	44
8-6-76	Before MISHEER,J.- Case called for motion to compel deft to produce documents Motion submitted Decision reserved	
8-26-76	Pltff;s supp interroga filed.	45
9-13-76	Defts answers to supp interroga filed.	46
9-13-76	Copy pf letter dtd. 9-13-76 from Judge Mishler to parties re: case on trail for 9-15-76 filed.	47
9-14-76	By MISHLER, CH. J-Mem of decision & order dtd 9-13-76 denying pltff's motion to compel deft to produce documents filed. Copy of this memo sent to pltff.	
9-15-76	Before MISHLER,J.- Case called for trial Pltff informs Court he is not ready for trial Trial ordered and begun Non jury Trial concluded The Clerk to enter judgment dismissing the complaint with costs in addition to attys fees in the amount of $500.00	
9-15-76	Judgment that pltff take nothing of the deft and that the complaint is dis with costs and that defts atty recover attyys fees in the amount of $500.00 filed.	49
9-20-76	Certified copy of order from C of A with copy of opinion attached affirming order of Court with costs to be taxed against appellant filed.	SO
9-30-76	Record received frmm the C of A. Acknow .mailed.	
10-12-76	Motion for an order pursuant to 28 USC 1915 and 42 USC 2000e for the Court to make satisfactory arrangement with the Court Reporters for payment of the cost of the transcript of 9-15-76 etc. filed.	(51)
10-12-76	Notice of appeal filed. Copy mailed to the C of A.	(52)
10-16-76	By MISHLER, CH.J-Memo of decision & Order dtd 10-14-76 re transcript to pltff filed. Copy of this memo to Court Reporters.	(53)
10-19-76	Civil appeal scheduling order filed.	(54)
11-18-76	STENOGRAPHIC TRANSCRIPT OF 09-15-1976	(55)

CLOSED

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ SEP 15 1976 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

BISWANATH HALDER,

Plaintiff,

-against-

AVIS-RENT A CAR SYSTEM,

Defendant.

----------x

JUDGMENT

1552

74 C ~~1560~~ 5

M'FILMED

This action having come on for trial before the Court, Honorable Jacob Mishler, United States District Judge, presiding, and the plaintiff having informed the Court that he was not ready for trial and the Court having ordered the trial to begin without a jury and at the conclusion of the trial, the Court, making findings of fact and conclusions of law on the record, and directing the Clerk to enter judgment dismissing the complaint with costs and awarding defendant's attorney fees in the amount of $500.00, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant and that the complaint is dismissed with costs and that defendant's attorney recover attorney's fees in the amount of $500.00

Dated: Brooklyn, New York
September 15, 1976

Lewis Orgel
Clerk

By: Thomas Blastos
Cheif Deputy Clerk

Mailed a copy to Meyer, English & Ciancielli, Attorneys for Avis Rent A Car, Inc., at 160 Mineola Boulevard, Mineola, New York 11501, by first class mail.

Bernadette Weldon

January 31, 1977